Supreme Court, U.S.
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No. 93-1114

In The
Supreme Court of the United States
October Term, 1993

DONALD C. WINSTON,
Petitioner,

v.

MAINE TECHNICAL COLLEGE SYSTEM,
CENTRAL MAINE TECHNICAL COLLEGE,
and RICHARD CONRATH,
Respondents.

Petition For Writ Of Certiorari
To The Maine Supreme Judicial Court

BRIEF IN OPPOSITION

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Questions Presented

1. Whether, under Section 504 of the Rehabilitation Act of 1973 as it existed prior to the enactment of 29 U.S.C. § 706(8)(F) which became effective on October 29, 1992, a college instructor terminated for sexually harassing one of his students could contest the termination by contending that he was the victim of employment discrimination by reason of his "sexual addiction."

2. Whether, assuming for purposes of argument that "sexual addiction" would have been a handicap entitled to protection under the Rehabilitation Act prior to October 29, 1992, the Maine Supreme Judicial Court properly determined that Section 706(8)(F) was nevertheless applicable to alleged discrimination that occurred prior to October 29, 1992.

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BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

Respondents Maine Technical College System, Central Maine Technical College and Richard Conrath respectfully request that the Court deny Donald Winston's petition for a writ of certiorari seeking review of the decision of the Maine Supreme Judicial Court reported at 631 A.2d 70 and reproduced in the Appendix to the Petition for Certiorari ("App.") at A1-24.

STATUTES INVOLVED

As of 1989, Section 504(a) of the Rehabilitation Act of 1973, which is codified in 29 U.S.C. § 794(a), provided in pertinent part as follows:

> No otherwise qualified individual with handicaps in the United States, as defined in Section 7(8) [29 U.S.C. § 706(8)], shall, solely by reason of her or his handicap, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance . . .

Effective October 29, 1992, this provision was amended to read as follows:

> No otherwise qualified individual with a disability in the United States, as defined in Section 7(8) [29 U.S.C. § 706(8)] shall, solely by reason of her or his disability, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance.

See Pub.L.No. 102-569, § 102(p)(32), 106 Stat. 4360. At the same time, Congress enacted an amendment to Section 7(8)(F) of the Rehabilitation Act, 29 U.S.C. § 706(8)(F), which provides as follows:

> (F). For purposes of Sections 501, 503, and 504 [29 U.S.C. §§ 791, 793, and 794], the term "individual with a disability" does not include an individual on the basis of
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> (i) transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, or other sexual behavior disorders;
>
> (ii) compulsive gambling, kleptomania, or pyromania; or
>
> (iii) psychoactive substance abuse disorders resulting from current illegal use of drugs.

Pub.L.No. 102-569, § 102(f), 106 Stat. 4349.

STATEMENT OF THE CASE

Petitioner Donald Winston was a tenured English Instructor at Central Maine Technical College (CMTC) in June 1989 when he was terminated for violating the college's sexual harassment policy after a complaint by a student, Kirsten McQuillan, in Winston's English class. The Maine Superior Court found that the underlying facts relating to the incident which led to Winston's termination were not seriously in dispute. (App. F3). It summarized them as follows:

> The complainant in the 1989 incident was a student in Mr. Winston's English class. Mr. Winston, who was approximately 30 years older than the student, had observed the student and viewed her as attractive. After a school promotional event at the Bangor Mall, Mr. Winston came to believe that the student might be receptive to his interest. This belief was not based on anything that the student had said. It derived from Mr. Winston's views of how

the student had dressed, how she sat in a chair, and how she dealt with others.

Mr. Winston had meetings with this student to discuss English papers. Mr. Winston then arranged a private meeting with the student, ostensibly to discuss a 'problem' regarding another student. There are inconsequential differences as to what was actually said at this meeting in a conference room. However, based on either version, Mr. Winston's attraction to the student was discussed. There is no dispute that they then proceeded to an empty classroom, that Mr. Winston kissed the student and that she left the classroom immediately thereafter. Mr. Winston claims that this event was entirely consensual, the student asserts that it was not. However, there is no dispute that . . . Mr. Winston acknowledged its inappropriateness in relationship to a student. There is also no dispute, from independent observations of fellow students and faculty members, that the student evidenced significant emotional distress, initially for undisclosed reasons, following the incident and prior to her disclosure of the sexual harassment event to school

> officials. After the kissing incident, the student felt there was further invitation to a possible relationship at private meetings arranged by Mr. Winston to discuss her school work.

App. F3-6 (footnote omitted).

This was not the first time that Winston had initiated a romantic encounter with a student. In 1988, Winston had kissed another student and arranged, but later cancelled, a date with the student off school grounds. This incident was not the subject of any complaint but, when the student thereafter missed several classes, Winston had disclosed the incident to a fellow faculty member and had stated his belief at that time that he had acted improperly in initiating a sexual relationship with a student.

At his deposition in this action, Winston also acknowledged that, while a teacher at Northern Maine Technical

College prior to joining the faculty at CMTC, he had had sexual relationships with two students and had made a pass at at least one other student.

In addition, in 1984, a nursing student had alleged that she had been sexually harassed by Winston, stating that she believed Winston sought sexually related contact with her and had implied that favorable responses to his initiatives might affect her grades. This incident did not result in a formal complaint, and Winston denied that any such harassment occurred.

Following Winston's termination based on the 1989 incident, Winston's union initiated grievance procedures in accordance with the applicable collective bargaining agreement, and the matter eventually proceeded to arbitration. In the arbitration, Winston was represented

by one of the same counsel who now represents him in the instant lawsuit. In that proceeding, Winston argued both (1) that he had not engaged in any misconduct because the 1989 incident with McQuillan had been consensual, and (2) that his termination resulted from discrimination against him based on an alleged disability, i.e., "sexual addiction."[1]

After an 11-day arbitration hearing, the arbitrator issued a 156 page opinion that upheld Winston's termination for misconduct.

Winston filed this lawsuit in June of 1991, alleging that his termination constituted unlawful discrimination against the handicapped under the Maine

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[1]As the Maine Supreme Judicial Court noted (App. A6), the applicable collective bargaining agreement provides that an employee may only be terminated for just cause and establishes a policy against all forms of illegal discrimination.

Human Rights Act and under Section 504 of the Maine Rehabilitation Act. His complaint expressly alleged that he was handicapped or disabled because he suffered from "sexual addiction." Complaint, ¶¶ 6-7. It also alleged that the termination constituted a violation of 42 U.S.C. § 1983. Winston's complaint sought his reinstatement as a teacher at CMTC, back pay, and damages.

After conducting discovery, respondents moved for summary judgment in the Maine Superior Court, contending, inter alia, that Winston's alleged "sexual addiction" did not qualify as a handicap or disability within the meaning of the Maine Human Rights Act or the federal Rehabilitation Act.[2] In opposition to

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[2]In addition, respondents argued in the alternative that even assuming for purposes of argument that "sexual addiction" could constitute a disability, that same condition -- manifested

summary judgment, Winston offered the opinions of two experts in support of his claim that his "sexual addiction" constituted a handicap or disability. One of those opinions came from a licensed social worker who has been counseling Winston since 1989. The other came from Charles Johnson, M.D., a psychiatrist.

Dr. Johnson's opinion that Winston was handicapped within the meaning of the Rehabilitation Act was based upon a theory that there are various types of "process addictions" that, if pursued to the point that they become detrimental to the person involved, would fit the criteria for "impulse control disorder not otherwise

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in Winston's propensity to initiate sexual relationships with students -- meant that he was not an "otherwise qualified" individual within the meaning of Section 504 of the Rehabilitation Act and also disqualified him from protection under a similar provision of the Maine Human Rights Act. See 5 Me.Rev.Stat.Ann. § 4573(4) (Supp. 1993).

specified" contained in the Diagnostic and Statistical Manual III-R (DSM III-R) categorizing mental disorders. For example, in Dr. Johnson's opinion, one could be addicted to a sport such as running. If carried to an extreme, this would qualify a "running addict" as handicapped for purposes of the Maine Human Rights Act and the federal Rehabilitation Act. In Dr. Johnson's view, "sexual addiction," such as experienced by Winston, constituted a similar handicap.

Notably, Dr. Johnson acknowledged that Winston's alleged "sexual addiction" does not fit precisely within any of the categories of mental disorders in the DSM III-R. He also admitted that his "process addiction" theory was shared by only a

"subset" of physicians.[3] Finally, Dr. Johnson agreed that Winston should be held accountable for his actions, especially any sexual misconduct. His report noted that Winston's addictive condition "cannot be cured and is always in danger of relapse."

Both of Winston's experts testified that, in light of Winston's "addiction," it was unlikely that he would be hired in another teaching position. Although they also opined that Winston was currently capable of performing his job as a teacher and interacting with students, Winston himself testified that it would be "easier to handle a teaching situation where there

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[3]This was confirmed by Paul Applebaum, M.D., a psychiatrist who evaluated Winston as part of the present lawsuit. As Dr. Applebaum noted, there is no indication in DSM III-R that the diagnostic category referred to by Dr. Johnson is intended to apply to "sexual addiction" or any other "process addiction."

aren't as many women around." Although Winston testified that he has limited his sexual relations to his marriage since his termination, he admitted that he had made one visit to a prostitute during 1991 when he was feeling depressed and anxious.

Based on the evidence submitted on respondents' motion for summary judgment, the Maine Superior Court ruled on November 2, 1992 that Winston's "sexual addiction" did not, as a matter of law, qualify for protection as a disability under the Maine Human Rights Act or under the Rehabilitation Act. App. F10-12. Accordingly, it entered judgment dismissing Winston's complaint.

Winston then appealed to the Maine Supreme Judicial Court. On September 1, 1993, that Court issued a ruling affirming the decision of the Superior Court. With respect to Winston's claim under the

Rehabilitation Act, the Maine Supreme Judicial Court noted that, although not raised by the parties, Section 7(8)(F) of the Act had been amended effective October 29, 1992 to expressly provide that the term "individual with a disability" did not include individuals on the basis of "transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, or other sexual behavior disorders." 29 U.S.C. § 706(8)(F), as enacted by Pub.L.No. 102-569, § 102(f).

Finding no clear evidence of congressional intent for or against the retroactive application of Section 706(8)(F) to currently pending cases, the Court applied the presumption expressed in Bradley v. School Board of City of Richmond, 416 U.S. 696, 711 (1974), and

ruled that Section 706(8)(F) could have been relied upon by the Superior Court to reject Winston's claims under the Rehabilitation Act.[4] (App. A10-13).

On September 14, 1993, petitioner filed a motion for reconsideration with the Maine Supreme Judicial Court, arguing that he had not had an opportunity to brief or argue the question of the retroactive application of 29 U.S.C. § 706(8)(F). Petitioner's motion was

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[4]Similarly, the Court upheld the dismissal of Winston's Maine Human Rights Act claims on the ground that it was appropriate for Maine employment discrimination law to follow federal law on this issue, and that both the federal Rehabilitation Act and the Americans With Disabilities Act excluded sexual behavior disorders from the definition of disability. App. A15-17, citing 29 U.S.C. § 706(8)(F) and 42 U.S.C. § 12211(b)(1). Finally, the Court affirmed the dismissal of Winston's Section 1983 claims, ruling that CMTC and the Maine Technical College System were not "persons" within the meaning of Section 1983 and that to the extent that petitioner was suing Richard Conrath in his individual capacity, Conrath was entitled to qualified immunity. (App. A17-23).

denied on September 28, 1993, and petitioner thereafter filed the instant petition for a writ of certiorari.

Winston's petition focuses solely on the dismissal of his claims under the Rehabilitation Act. He has not chosen to seek review of the dismissal of his other claims.

REASONS FOR DENYING THE WRIT

The issue in this case is whether a college instructor, who was fired for sexually harassing one of his students, can contest that termination by contending that he was discriminated against by reason of his "sexual addiction." Petitioner suggests that this case presents an appropriate opportunity for this Court to reconcile the apparently divergent lines of authority represented by Bradley v. City of Richmond, 416 U.S.

696 (1974), and Bowen v. Georgetown University Hospital, 488 U.S. 204 (1988), with respect to the application of newly enacted legislation to already pending lawsuits. For the reasons set forth below, we disagree.

I. SECTION 706(8)(F) DID NOT EFFECT ANY CHANGE IN THE LAW AS IT APPLIES TO THIS CASE.

We acknowledge that five members of this Court have expressed the view that there is at least an "apparent tension" between Bradley and Bowen with respect to whether newly enacted legislation should be presumed to apply to pending cases. Kaiser Aluminum & Chemical Corp. v. Bonjorno, 494 U.S. 827, 837 (1990). See id. at 841 (Scalia, J., concurring). However, the Bradley/Bowen issue does not arise unless the Court first concludes that Section 706(8)(F), as applied to the

specific claims at issue in this case, represents a material change from pre-existing law that could potentially alter the outcome of this lawsuit. See, e.g., United States v. Alcan Aluminum Corp., 990 F.2d 711, 724 (2nd Cir. 1993) (court need not choose between Bradley and Bowen presumptions because the outcome was the same under pre-existing law as under the newly-enacted statute).

In this case, there are at least two reasons why the outcome of Winston's Rehabilitation Act claim would have been the same both under pre-existing law and after the enactment of 29 U.S.C. § 706(8)(F): (1) Winston's "sexual addiction" did not, as a matter of law, qualify as a handicap that was protected under the Rehabilitation Act prior to October 29, 1992; and (2) because of his propensity to initiate sexual

relationships with students, Winston was not an "otherwise qualified" individual within the meaning of the Rehabilitation Act.

(a) "Sexual Addiction" Is Not Entitled to Protection Under the Rehabilitation Act.

At the outset, we are aware of absolutely no precedent for petitioner's claim that his "sexual addiction" constituted a handicap or disability entitled to protection under the Rehabilitation Act prior to October 29, 1992. To our knowledge, no court has ever recognized "sexual addiction" as the kind of impairment that could entitle an individual to relief under the Rehabilitation Act.

In this connection, it is significant that petitioner's own expert acknowledged that his views were held by only a

"subset" of physicians and that he based his diagnosis of Winston's "sexual addiction" upon a very broad addiction model that would essentially encompass any form of compulsive behavior. The problem with this model is that it proves too much. Just because various forms of misconduct may be characterized by "poor impulse control," that does not transform them into disabilities. Cf. Daley v. Koch, 892 F.2d 212, 215 (2nd Cir. 1989).

In addition, there are strong public policy arguments against the recognition of any such "disability." The theory that governmental entities subject to the Rehabilitation Act should be barred from discriminating against "sex addicts" is essentially nothing more than an invitation to excuse sexual misconduct. Sexual urges frequently and unfortunately drive individuals to engage in misbehavior

and to victimize others. Under the theory advanced by petitioner in the courts below, such individuals can safely yield to those urges and then claim the protection of the Rehabilitation Act by reason of their "sexual addiction." Indeed, under petitioner's theory, the more an individual yields to his impulses and the greater the sexual misbehavior he engages in, the stronger is his claim to disability.

Acceptance of petitioner's theory would run a serious risk of undercutting society's efforts to combat sexual harassment in the workplace and in the classroom. To be sure, petitioner contends that no sexual harassment occurred in this case because he continues to maintain (although the arbitrator found otherwise) that his kissing of Kirsten McQuillan was consensual. Even assuming

that petitioner might have thought that Ms. McQuillan consented, however, the likelihood that any such "consent" could have been motivated by Ms. McQuillan's fear of offending the person who would grade her course work demonstrates the inherent problem in petitioner's theory.

The only authority that petitioner offers in support of the proposition that "sexual addiction" constituted a handicap or disability prior to October 29, 1992 is a single reference in a House Committee Report relating to the Americans With Disabilities Act of 1990. See Petition at 29-30, citing to H.Rept. No. 101-485 (III), 101st Cong., 2nd Sess. 76 (1990), reprinted at 1990 U.S. Code Cong. & Admin.

News 499.[5] There are three problems with petitioner's reliance on this report.

First, the Committee Report relied upon by petitioner represents at most the views of certain members of a subsequent Congress and cannot constitute authoritative evidence of the intent of the Congress that originally enacted the Rehabilitation Act. E.g., Oscar Mayer & Co. v. Evans, 441 U.S. 750, 758 (1979). Second, the report in question is only one of several Committee Reports relating to the Americans With Disabilities Act. On the specific issue of concern in this

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[5]Section 511(b) of the Americans With Disabilities Act, 42 U.S.C. § 12211(b), is virtually identical to 29 U.S.C. § 706(8)(F), and the legislative history of the 1992 Rehabilitation Act amendments states that Section 706(8)(F) is intended to incorporate the same exclusions from the term "individual with a disability" as are contained in the Americans With Disabilities Act. S.Rept.No. 102-357, 102d Cong., 2nd Sess. 16 (1992), reprinted in 1992 U.S. Code Cong. & Admin. News 3727.

case, another Committee Report indicates that the issue of whether sexual behavior disorders could constitute "disabilities" was an open question.[6]

Finally, the Committee Report relied upon by petitioner does not specifically address "sexual addiction" or the particular problems that would result from recognizing such a condition as a disability for purposes of the federal anti-discrimination statutes. Even if that report suggests that, absent a statutory exclusion, some sexual behavior

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[6]Thus, while the Judiciary Committee Report relied upon by the petitioner suggests that, in the absence of an express statutory exclusion, sexual behavior disorders "would" have been included under the ADA, H.Rept. No. 101-485 (III), 101st Cong., 2nd Sess. 76 (1990), reprinted at 1990 U.S. Code Cong. & Admin. News 499, the Education and Labor Committee Report states only that absent a statutory exclusion, sexual behavior disorders "could" have been covered under the ADA. H.Rept. No. 101-485 (II), 101st Cong., 2nd Sess. 142 (1990), reprinted at 1990 U.S. Code Cong. & Admin. News 425.

disorders would have been covered by the ADA, it offers no support for the proposition that "sexual addiction" would have been a disability entitled to protection.

Under these circumstances, the legislative history simply does not support an argument that, at least as far as "sexual addiction" is concerned, the enactment of 29 U.S.C. § 706(8)(F) represented any material change from prior law.

(b) Winston Is Not An Otherwise Qualified Individual Within The Meaning Of The Rehabilitation Act.

Even if "sexual addiction" somehow could have qualified as a handicap for purposes of the Rehabilitation Act prior to October 29, 1992, the undisputed evidence demonstrated that Winston was not

an "otherwise qualified" individual entitled to relief under Section 504. Under the statute, an otherwise qualified individual is one who can meet all of the necessary requirements of his or her job in spite of the particular handicap in question. Southeastern Community College v. Davis, 442 U.S. 397, 406 (1979).

In this case, however, Winston's "sexual addiction" -- which manifests itself as a propensity for compulsive promiscuity -- prevents him from meeting the necessary requirements of his job. Winston has acknowledged that initiating a sexual relationship with one of his students is improper, yet he has done this on repeated occasions. He acknowledges that he is not cured, and his own expert agrees that his condition is always in risk of relapse. Moreover, Winston testified that the primary trigger for his

misconduct was stress in his life outside of his job[7] -- a condition over which the Maine Technical College System has no control and which could recur at any time. The undisputed evidence, therefore, demonstrates that Winston poses a risk to female students and is therefore foreclosed from a normal faculty role. As a result, he cannot quality as an "otherwise qualified" individual under the Rehabilitation Act.

Indeed, the irony of Winston's argument is that the same evidence on which he relies to prove his claimed disability, i.e., that his alleged "sexual addiction" substantially limits his ability to work and was the cause of his

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[7]At the arbitration proceeding, he also stated that his compulsive promiscuity could be triggered by seeing "a lot of leg."

indiscretions with his students,[8] demonstrates that CMTC was justified in terminating him and that he is not an "otherwise qualified" individual under the Rehabilitation Act. See Fields v. Lyng, 705 F.Supp. 1134, 1137 (D.Md. 1988), aff'd mem., 888 F.2d 1385 (4th Cir. 1989) (evidence of alleged disability put plaintiff into "inescapable quandary" in that it simultaneously demonstrated that he was not capable of continuing to perform his job).

In sum, as far as Winston's claim of "sexual addiction" is concerned, the outcome of this case is the same regardless of whether or not 29 U.S.C. § 706(8)(F) is applicable.

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[8]At his deposition, Winston was asked whether his sexual addiction was the cause of the kissing incident with Kirsten McQuillan and he unequivocally answered "yes, or I wouldn't have lost control of that situation." Winston Dep., April 29, 1992 at 205.

II. WHETHER SECTION 706(8)(F) SHOULD APPLY RETROACTIVELY IS NOT A SUFFICIENTLY IMPORTANT ISSUE TO WARRANT CERTIORARI.

Even assuming for the sake of argument that the retroactive application of 29 U.S.C. § 706(8)(F) could potentially alter the outcome of this case, it does not appear that this issue represents an important legal question deserving of this Court's attention. Although petitioner focuses on the apparently competing presumptions in Bradley and Bowen, the specific issue in this case involves an interpretation of the Rehabilitation Act in the particular context of Winston's claim.

As noted above, to the best of our knowledge, petitioner's claim that his "sexual addiction" deserved protection under the Rehabilitation Act is utterly unprecedented. Nor are we aware of any

other cases in which the retroactivity of Section 706(8)(F) is an issue. As a result, it appears that any ruling on whether Section 706(8)(F) may be retroactively applied, particularly to a claim of "sexual addiction," would be of limited importance except to the particular litigants in this case. The issue presented by petitioner, therefore, is simply not an issue that merits review by this Court.

III. THE DECISION BELOW WAS CORRECT.

Although we believe that the issue on which petitioner seeks certiorari need not be reached in this case, we do not mean to suggest any belief that the Maine Supreme Judicial Court may have erred in applying Section 706(8)(F) to the claims at issue in this case. Where Congress has established a clear policy in both the

Americans With Disabilities Act and in the Rehabilitation Act that certain alleged disorders may not form the basis of an employment discrimination claim, see 42 U.S.C. § 12211(b) and 29 U.S.C. § 706(8)(F), we submit that such a policy should be applied to pending as well as future cases absent compelling reasons to the contrary. See Aledo-Garcia v. Puerto Rico National Guard Fund, 887 F.2d 354 (1st Cir. 1989). Thus, regardless of the merits of the Bradley and Bowen presumptions in other contexts, Bradley was properly applied in this case.

On this issue, it is ironic that petitioner relies heavily on the First Circuit's Aledo-Garcia decision (see Petition at 28, 31, 32) since that decision, like the decision of the Maine Supreme Judicial Court below, applied the Bradley presumption and concluded that a

Congressional amendment to the age discrimination act would apply to claims of alleged discrimination that had occurred prior to the effective date of the amendment. Petitioner apparently cites Aledo-Garcia only because the result in that case turned out to favor the employee, but that is not a principled basis upon which to decide the legal issues involved in this case. The underlying principle in Aledo-Garcia was to effectuate the intent of Congress. Here, that intent is contained in 29 U.S.C. § 706(8)(F).

Two other brief points need to be made in this context. First, departing from the facts in the record, petitioner argues that what is "at issue in this case is the right of an employer to fire an employee solely because of a disability." Petition at 29. See id. at 30 (arguing

that petitioner lost his job "for reasons that had nothing to do with job performance"). These arguments are simply incorrect. Without belaboring the point, we respectfully submit that what is at issue in this case is a teacher who was properly terminated for misconduct consisting of sexual harassment and who is now seeking to avoid responsibility for his actions by ascribing them to "sexual addiction."

Finally, while petitioner also argues that petitioner should not have been penalized for disclosing his alleged sexual addiction to the CMTC, this argument is without any basis in the record. The undisputed facts demonstrate that when petitioner disclosed his alleged condition in connection with the 1988 incident (as to which no complaint was made by the student involved), no

discipline resulted. Petitioner was only disciplined after Kirsten McQuillan complained of sexual harassment in connection with petitioner's actions the following year.

CONCLUSION

The petition for a writ of certiorari should be denied.

March 7, 1994 Respectfully submitted,

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